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CHARLES ELMOR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 760.

STATE OF IOWA,
CONSERVATION COMMISSION OF IOWA,
HIGHWAY COMMISSION OF IOWA,
GEORGE CORRIELL, et al.,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE,
Intervenor.

PETITIONERS' REPLY TO OPPOSITION BRIEFS.

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MAY 1950.

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PETITIONERS' REPLY.

STATEMENT.

Your Petitioners received a copy of the Brief by the Federal Power Commission, the Respondent herein, on May 22, 1950, and received the Brief by the Intervenor on May 20, 1950.

It is our understanding that in preparing a Petition for a Writ of Certiorari it is not expected or intended that the propositions relied upon for a review shall be presented and argued in extenso. It is also our understanding that petitioners are required merely to state the propositions

justifying and warranting the consideration of this Court on review, and to make sufficient explanation thereof to show that the questions are properly raised and are involved in the case. It is possible that this Court, after granting the writ and upon review, will disagree with the validity of our propositions, but we are firmly convinced that when the matters involved in this case are considered by this Court upon review, that Petitioners will prevail.

Certain statements made by both the Respondent and the Intervenor in their Briefs in opposition to the Petition for a Writ of Certiorari make necessary a Reply more in the nature of a sampling of the argument to be made on review, than a mere showing to this Court that there are propositions that are meritorious and deserving of review by this Court on certiorari. Your Petitioners do not desire to unduly extend this Reply, but because of the great importance of the questions involved, feel that we should not take any chances on not adequately informing the Court as to the reasons and record against the assertions by Counsel for Respondent and for Intervenor in their opposition Briefs herein.

Both Respondent and Intervenor in their Briefs ignore and overlook outstanding and important grounds asserted by your Petitioners requiring a review by this Court. There are fundamental constitutional questions involved herein which require the thorough consideration of this Court, and which were ignored by both the Federal Power Commission and the Circuit Court.

We, therefore, in our anxiety to properly and adequately represent the sovereign State of Iowa and those associated with it in this proceeding, desire only to be sure that this Court is fully informed as to these matters.

THE COMMISSION'S FINDINGS OF JUNE 3, 1941.

Both the Respondent and the Intervenor state that in the prior and separate proceeding, known as F.P.C. Docket No. D.I. 154,[1] the Intervenor, on January 29, 1940, filed a Declaration of Intention to construct a 15,000 kilowatt *run-of-river* hydro-electric project. Both state that the State of Iowa was notified by letter dated February 7, 1940, addressed to the Governor, of the filing of this Declaration of Intention. The Respondent states no reply was received thereto. There is no evidence that such a letter was ever received by the Governor of Iowa, and the writer of this Brief shortly after he entered this case, made an investigation to determine whether any such a letter was received, and found that there was no record of its receipt and the then Governor, later United States Senator, Geo. A. Wilson stated that he not recall ever having received it. In any event, it is not claimed that this was an official notice of any hearing upon the matter. No notice was required by the Federal Power Act.

Subsequently on April 2, 1941, it is stated, the original Declaration of Intention describing the run-of-river project, was amended such as to substantially change the project to one involving a diversion of the Cedar River easterly through a canal to the power plant to be constructed on land, and then the water was to be discharged through a sluiceway into the Mississippi River. Respondent states in its Brief that since it received no reply to the so-called letter of February 7, 1940, it "did not advise the Iowa officials of the supplement to the Declaration filed on April 2, 1941." Both state that on June 3, 1941 the Commission entered its Findings in D.I. No. 154 under and through which it sub-

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[1] The case at bar was begun by the filing on August 11, 1941 with the Commission, an application for license to construct the revised project, and their case was docketed as F.P.C. Docket Project No. 1853.

sequently assumed and asserted jurisdiction in this the later case.

Both state that a copy of the Findings of June 3, 1941 was sent to the Iowa Commerce Commission, and that no response was received from and nothing done by the Iowa Commerce Commission. No reason is given why a copy of these Findings were sent to the Iowa Commerce Commission. Under the Iowa law, the Iowa Commerce Commission has never had jurisdiction over or any connection with the waters and rivers in the State, nor does it have regulatory control over hydro-electric projects. The only official agency of the State which has jurisdiction and supervision over all waters and streams located in the State is the Iowa Conservation Commission. The Executive Council of Iowa is the official body which had jurisdiction to authorize the construction of dams and projects upon and in the waters and rivers in the State. These are the only two State agencies having anything to do with the rivers in the State under the laws of Iowa. It is not known whether the copy of those Findings was ever received by the Iowa Commerce Commission. If it did receive it, the Commission had no official interest therein.

The Respondent and the Intervenors state that the Declaration of Intention was filed by Intervenor under the provisions of Section 23(b) of the Federal Power Act. That section does not provide for the holding of any hearings or the serving of notices upon anybody. All it provides is, that when the Declaration of Intention is filed with the Commission, it shall cause immediate investigation of such proposed construction to be made and make its findings. Therefore said proceeding cannot effect finality. No State, public body, or person is bound thereby, save possibly the party filing the Declaration of Intention. The only result of the Findings of June 3, 1941 was to require the First Iowa to file a formal application for a license under the

other provisions of the Federal Power Act. If First Iowa had elected not to do anything, then said Findings of the Commission of June 3, 1941 would not have had any effect one way or the other.

As stated in our Petition for a Writ of Certiorari at the bottom of page 23, the very same question as to whether such Findings by the Commission are a final order and are binding upon other parties who may be interested in the later application for a license, was before the Fourth Circuit Court of Appeals, in *Carolina Aluminum vs. Federal Power Commission*, 97 Fed. (2) 435. In that case an attempt was made to appeal from just such Findings as the Findings of June 3, 1941. There the Court said, referring to those Findings and distinguishing them from an Order, the following:

> "It is an Order and not a finding of the Commission that the Court is authorized to review; and there would seem to be little room for doubt that by an Order is meant some command of the Commission directing or restraining action or granting and denying some form of relief," * * *
>
> "An Order of the Commission is analogous to the judgment of the Court; and it is well settled that a finding constitutes no part of the judgment even though incorporated in the same instrument with it."
>
> "In reviewing the Order the Court may examine the findings to determine whether they support the Order, and may examine the evidence to determine whether it supports the findings; but the Court is given no authority to review a mere finding upon which no Order is based, even though it may determine a status which may form the basis of future governmental action, for even such a finding lacks the fundamental characteristics of an Order."

Thus in the case at bar, the Findings of the Commission on June 3, 1941 in Docket D.I. 154 are not a final order. At most they are Findings upon which the Commission subsequently in this proceeding docketed as Project No. 1853 now on review before this Court, made its final order granting the license to the Intervenor herein, and which obviously is a reviewable order. As stated in the last paragraph of the quotation above, the Commission in the proceedings at bar, used and adopted the "Findings" in the prior proceeding, D.I. 154, and the Courts in reviewing the order of the Commission granting the license may examine the Findings (including the Findings in D.I. 154) to determine whether they support the order, and may also examine the evidence to determine whether it supports those Findings. Although a status was determined by those Findings of June 3, 1941 in D.I. 154, there was no order utilizing those Findings until the final order of the Commission granting the license herein, and of which complaint is made.

The provision in the law authorizing review by the Courts to-wit: Section 313(b) of the Federal Power Act, provides only for review of an "order issued by the Commission."

This principle of law was confirmed in *Federal Power Commission vs. Metropolitan Edison Company*, 304 U.S. 375 at Page 384, 82 L.ed. 1408, 1414, where it was said:

> "The provision for review thus relates to an order of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case."

As stated, in arriving at the Findings of June 3, 1941, there was no hearing, no judicial notice, no due process, and no order. The Commission having adopted said Find-

ings in these proceedings, cannot shut the door and say that it will not permit those Findings of June 3, 1941, and the evidence upon which they were founded, to be reviewed, challenged or attacked. Those Findings are subject to review, and the jurisdiction, power and authority of the Federal Power Commission based upon those Findings are most assuredly reviewable by the Courts at the time they are adopted in any final order. If not, then fundamental rights guaranteed by the Constitution have been destroyed.

It is admitted by both the Respondent Commission and the Intervenor that no hearing was permitted or afforded as to the jurisdiction, power and authority of the Federal Power Commission, to affirmatively authorize the construction of the proposed project in this proceeding, although said issues were pleaded in the original Petitions of Intervention and in subsequent Motions and pleadings by the State of Iowa. In every instance the Commission refused to permit said issues to be presented, refused to take evidence thereon, and refused to pass upon or determine said issues in this proceeding. Tenders of evidence were made to inform the Commission that unchallengeable evidence is available and exists to show that the Commission does not have the power and authority to affirmatively license and authorize the construction of this project over and against the objections and protests of the State of Iowa. That evidence is overwhelming and without dispute that the Commission does not have jurisdiction, power or authority to license the proposed project. The Courts cannot shut the door upon such issues, and must afford the Petitioners an opportunity to be heard thereon. There is and was no res judicata. See the late case of *United States v. U. S. Smelting, R. & M. Co.*, decided by this Court March 27, 1950, in 94 L.ed. Advance Opinions, 488, at p. 496.

THE PRIOR SUPREME COURT DECISION.

Both the Respondent and the Intervenor in argument insist that this Court finally disposed of the jurisdictional question for all time, and that the question could not in the subsequent proceedings in this same case before the Commission after the decision of this Court and on remand, be challenged, raised or decided. The Circuit Court followed the Respondent and Intervenor off the deep end on this proposition. It is submitted that if that opinion by this Court is read in the light of the sole question there submitted for review, no such finality can be gleaned therefrom.

It will be noted that the Commission on January 29, 1944 after holding certain hearings, dismissed the application for a license herein, on the sole ground that the applicant had not "presented satisfactory evidence pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of the applicable laws of the State of Iowa". It mattered not to the State of Iowa and others interested in the dismissal of the application, upon what ground the petition was dismissed, just so long as it was dismissed. If the petition was dismissed and no license issued, then there was nothing for the State of Iowa to contest. If the Courts had sustained the dismissal by the Commission, then there would have been nothing further to complain of. It would then not matter whether the Commission claimed jurisdiction, power and authority over the project or not under those circumstances. The Court of Appeals for the District of Columbia on review, did affirm that order, but this Court reversed it and remanded the case for further proceedings. That Petition for Review was by First Iowa and challenged the order of the Commission by asserting only that the Federal Power Act superseded the laws of the State of Iowa referred to by the Commission as not having been complied with. This Court then held that those particular Iowa laws were unenforce-

able and not such laws as were meant and intended to be complied with by the provisions of Section 9(b) of the Act. That was all that was before this Court.

Obviously that order of the Commission dismissing the application, was on the assumption that it had jurisdiction. This Court took the case in that condition and with those assumptions as the background for the order being reviewed. This Court in the Opinion (328 U.S. 152 at 163, 90 L.ed. 1143 at 1149 stated:

> "The findings made by the Commission on June 3, 1941, in response to the Petitioners' Declaration of Intention *are not in question.* For the purposes of this application it is settled that the project will affect the navigability of the Cedar, Iowa and Mississippi Rivers, each of which has been determined to be a part of the navigable waters of the United States; will affect the interests of interstate commerce; will flood certain public lands of the United States; and will require for its construction, a license from the Commission. The project is clearly within the jurisdiction of the Commission under the Federal Power Act." (Italics ours)

The recital just quoted includes a paraphrase of the Findings of June 3, 1941, and as stated by the Supreme Court, those Findings in the proceeding before the Supreme Court were not in question. Therefore, the Supreme Court proceeded upon the assumption of jurisdiction because of that status of the case.

Immediately following the last above quotation, the Supreme Court stated that the issue was only, as follows:

> "The question at issue is the need, if any, for the presentation of satisfactory evidence of the Petitioners' compliance with the terms of Chapter 363 of the Code of Iowa. This question is put in issue by the petition for review of the order of the Commission, which dismissed the application solely on the ground of the failure of the petitioner to present such evidence."

Obviously everything that the Supreme Court said in its Opinion, is upon the assumption that the Commission had jurisdiction, because that issue was not challenged and was not properly before the Court at that time.

The question of the jurisdiction, power and authority of the Commission to affirmatively authorize and license the construction of this project under the circumstances of this case, is properly before this Court, and this Court is bound to recognize the right of the Petitioners herein to have this question reviewed, and to have their day in Court.

The question decided is the construction and interpretation of Section 9(b) of the Act. None other. The Supreme Court decided that the Federal Power Act, (on the assumption that the Act was applicable and under the circumstances of that review,) superseded the State laws referred to by the Commission, and that therefore compliance with those State laws was not required. Anything else in that Opinion is dicta.

Upon the reopening of the case after the remand by this Court, the further proceedings were in effect and in fact a continuation of the hearings from the point immediately before the issuance of the dismissal order by the Commission. Therefore in the further proceedings, the State of Iowa and those associated with it had the right to challenge the jurisdiction, power and authority of the Commission, and had the right to be heard thereon by the Commission. The record is full of attempts and requests by the State of Iowa to be heard upon that issue. Yet the Commission arbitrarily, and in fact belligerently, refused to consider the issue, to take evidence, or to decide the question in the light of the unchallengeable evidence described and tendered to the Commission, which evidence unquestionably shows beyond dispute that the Commission does not have the jurisdiction, power and authority to affirmatively license this project over and against the pro-

tests and objections of the State of Iowa and those associated with it. This Court cannot deny due process to the petitioners herein upon this question.

CONSTITUTIONAL QUESTIONS.

Constitutional questions are always available and the Petitioners herein are entitled to a review by this Court of these questions as submitted in the Petition for a Writ of Certiorari.

Your Petitioners have challenged the constitutionality of the Federal Power Act, if it be construed to authorize and empower the Federal Power Commission to affirmatively authorize and license the construction and operation of the proposed project over and against objections of the State of Iowa and those associated with it. As stated, the project is not in the interests of interstate commerce, and the Order of the Commission, regardless of the arbitrary, capricious and unsubstantiated findings made by the Commission in connection therewith, is in excess of the power which the Federal Government has under the commerce clause of the Constitution.

Also, the Act of the Federal Power Commission in making its order affirmatively authorizing and licensing the construction and operation of the proposed project is an unconstitutional assumption of the power not given to the Federal Power Commission by the Federal Power Act, and not permitted by the Commerce Clause of the Constitution. The exercise of this power by the Commission is arbitrary, unconscionable and unconstitutional. The Commission is using its assumed power to destroy the Cedar River an inland river in Iowa, for private purposes, for private individuals, and for the single purpose of generating electric energy for sale commercially. This is not authorized or permitted by either the Commerce Clause of the Constitution or the Federal Power Act.

Constitutional rights and constitutional questions are always reviewable.

St. Joseph Stockyards Co. vs. United States, 298 U.S. 38 at 52; 80 L.ed. 1033, 1041. There this Court among other things said:

> "But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded."

ECONOMIC FEASIBILITY.

Respondent contends that the fact that there was no evidence adduced upon the necessary elements that there must be firm selling contracts and firm commitments to finance the project, is not controlling, and that the Finding by the Commission that the project is economically feasible meets all requirements. Respondent argues that the Act's sole requirement as to economic feasibility is contained in Section 10(a) which provides that the project "shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways *for the use or benefit of interstate or foreign commerce* for the improvement and utilization of water power development," etc. (Italics ours)

Note that the language quoted by the Respondent in its Brief from Section 10(a) says that the project must be one "best adapted to a comprehensive plan for the improving or developing a waterway for the use or benefit of interstate or foreign commerce". That is the primary and first legal

consideration. As previously stated, the admitted, undenied facts are that if this project is built, there can be no interstate commerce or navigation into or from the Cedar River. The plan proposed would preclude any possible arrangement by which watercraft could be transferred from the Mississippi River to the Cedar River and vice versa.

It will be noted further, that the Commission has a further obligation expressed and stated in Section 4(e) of the Act. It is there provided that the Commission shall have power to issue licenses for certain limited purposes, primary among which is the following:

> "For the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project work *necessery or convenient for the development and improvement of navigation* and for the development, transmission and utilization of power across, along, over, or in any of the streams or other bodies of water *over which Congress has jurisdiction under its authority to regulate commerce.*" etc. (Italics ours)

The foregoing quotation is a mandate to the Commission to require evidence as a foundation for the issuance of its license that the requirements set out in the quotation have been met, the first of which is "for the development and improvement of navigation", and then only in waters "over which Congress has jurisdiction under its authority to regulate commerce". In the case at bar there is no room for argument or dispute, nor is there conflict in the evidence, that the construction of the project will destroy navigation from and into the Cedar River, and that the project is a single purpose project, namely, the granting of a license to private individuals to exploit the waters of the Cedar River for the sole purpose of developing power to sell commercially. There is no evidence in the record anywhere that there could be any possible navigation through, around

or over the power plant and the 100 foot drop at the power plant, and through the sluiceway from the power plant for several thousand yards to a point where the water is dumped into the Mississippi River. It is ridiculous to assume or to create a fiction under the record in this case that there is any possible development and improvement of navigation involved. There is an utter absence of evidence thereon, and as stated, the very nature of the project conclusively and without dispute, shows that navigation is destroyed and prohibited rather than developed and improved by the project.

Furthermore, in Section 4(e) of the Act, it is provided:

> "Whenever the contemplated improvement is, in the judgment of the Commission, *desirable and justified in the public interest for the purpose of improving or developing the waterway or waterways for the use or benefit of interstate or foreign commerce*, a finding to that effect shall be made by the Commission". (Italics ours)

Counsel for Respondent in their Brief in opposition ignore and omit the foregoing quotation which is a mandate in the law. This requires that the finding must be "in the public interest". What is the public interest? Attention is called to what this Court had to say about it in *United States of America, et al vs. Frank O. Lowden, et al.*, 308 U. S. 225, at 230; 84 L. ed. 208 at 213.

The language quoted from Section 4(e) of the Act is that the project must be found to be "desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce". That means that interstate commerce is of primary importance and in truth, it should be because the only authority the Commission has is under the Commerce Clause of the Constitution. Under the undenied, undisputed facts in this case, the Commission cannot honestly make a finding that this project is in the

public interest for the purpose of improving or developing the Cedar River for the use or benefit of interstate or foreign commerce. Neither can it find that it is necessary to divert the water of the Cedar River into the Mississippi River to make it more navigable. There is no evidence in the record upon either proposition. Therefore, the Commission has arbitrarily, without foundation in the record, and without the benefit of any evidence in the record, made the finding quoted in its Brief at the bottom of page 14. This mistatement by the Commission alone justifies and requires an investigation by this Court into the doings of this Commission.

Again on page 15 of Respondent's Brief, Respondent refers to the fact that it made a finding that "The proposed project is best adapted to a comprehensive plan for improving and developing the Cedar and Mississippi Rivers for the use and benefit of interstate commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes."

Again we say to this Court that there is an absolute absence of evidence to justify at least the first part of this finding, namely, that the proposed project is best adapted to the comprehensive plan for improving and developing the Cedar and Mississippi Rivers for the use and benefit of interstate commerce. There is not one scintilla of evidence in the record upon the subject. This is a capricious, arbitrary finding without any foundation whatsoever. The sufficiency of the evidence to sustain the other statements in the "finding" is also disputed.

Counsel for the Respondent blandly say that these mere findings clearly meet the requirements of the law, and that the Petitioners do not claim that these findings are not supported by substantial evidence and are therefore conclusive. This is an absolute misstatement of the record. One of our principal attacks upon the order granting the license and

upon the project is that it is destructive of interstate commerce and of navigation, and that it absolutely eliminates any possible navigation into and from the Cedar River. Therefore, these matters are subject to review, and this Court must investigate the evidence in the case to determine whether or not there is any evidence upon which such findings could be made. If there is no basis for the findings, then the order complained of, which is the result of these findings, must be set aside and held for naught. The State of Iowa and those associated with it are entitled to have these matters investigated by this Court.

The citations of cases by counsel to sustain their proposition may be correct as abstract statements of the law, but they have no application here.

Counsel further states that the findings as to other aspects of economic feasibility, including marketability of electricity and commitments to finance, are not statutory requisites to the issuance of a license. That they are only factors among others which the Commission considers. In this connection attention is called to the first order of the Commission authorizing the issuance of a license dated December 19, 1947. (R. 5 (91)). In paragraph (11), the Commission thought it important enough to provide that a license be issued for the construction, operation and maintenance of the project provided among other things, that within nine months from the date of the order, unless otherwise ordered by the Commission, the authorization shall terminate "if the applicant fails to submit satisfactory evidence of commitments to finance construction of the project". That became one of the important basic factors in the case as is shown by the Commission's own order. Then the Secretary of the First Iowa under date of August 31, 1948 wrote a letter to the Commission with which it enclosed a letter from a firm designated as "McDougal & Condon, Incorporated", dated August 30, 1948 (R. 5(97, 98)). It will be noted that that

letter is directed to the First Iowa, not the Commission, and merely states that they feel that the obligations which the Corporation can issue for construction purposes will be marketable and that when the license shall have been issued, they would be glad to proceed with the completion of the financing program. That is accepted by the Commission as evidence. No opportunity for cross-examination, no hearing upon it, not anything. Note that this letter does not commit McDougal & Condon to anything. There was also attached a letter from Mr. William J. Neal, Acting Administrator of the Rural Electrification Administration dated August 31, 1948, directed to the First Iowa, stating only that in his opinion a market for the sale of power to R. E. A. Co-operatives in the area exists and will exist in the future, if energy is made available at sufficiently low cost. That is submitted as evidence also as to the marketability of the proposed project. That too is but the expression of a mere opinion, is not evidence, and has no foundation whatsoever in the record. The Federal Power Commission, over the dissent of its Chairman, accepted these flimsy letters as evidence, and on September 8, 1948, modified its order of December 19, 1947 by removing the condition that the applicant present satisfactory evidence of commitments to finance the project within nine months, and made a finding that the First Iowa "has submitted satisfactory evidence of commitments to finance construction of the project", (R. 5(107)) and ordered that a license issue forthwith. Mr. Smith, Chairman of the Commission, dissented (R. 5(109)). In his dissent, Mr. Smith stated:

> "The Commission's regulations governing applications for major project licenses require, among other things, a showing of the proposed use or market for the power to be developed and a statement or explanation of the proposed method of financing. The materiality and interrelationship of these factors in their bearing upon economic feasibility are apparent from the testimony

during the hearings, are emphasized in the Examiner's Report served January 30, 1947, and are pointed out in the Commission's Opinion No. 162. They are reflected also in the letters to First Iowa from the Chicago banking firm of McDougal & Condon and from the Acting Administrator of the Rural Electrification Administration, dated respectively August 30, and August 31, 1948, upon which the present action of the majority is in part based. * * *

"Although certain general comments and expressions of interest in the purchase of the power and in the financing of the project have been submitted in the letters referred to above, the record is now no more specific in these respects than heretofore. The Commission has no more adequate or definite basis than it had in December 1947 for arriving at conclusions concerning the economic feasibility of the enterprise."

Also the Trial Examiner, the trier of the facts in his report to the Commission upon his trial stated: (R. 5, (83-86))

"In the present proceeding there has been no attempt to show that any firm contracts have been made or that any definite commitments have been made for purchase of any portion of the power." (P. 83).

"The Applicant's plan of financing (as outlined in Exhibit G to the application) provides for sale of 40 year, 4 percent revenue bonds for the whole cost of the project. The proposed project could be financed by the issue of revenue bonds upon a 4 percent basis and amortized over a 30-year period if the Applicant had binding contracts for the sale of electric energy for a period of approximately 10 years, with sufficient operating revenues assured to cover the estimated cost of operation, maintenance, reserves and 133 percent of the debt service. But it has no firm sales contracts at all and no such assurance of revenues. Neither does the Applicant have any firm commitments for financing. (P. 85)

"The Applicant has not, up to the present time, shown the proposed project to be economically feasible with present high construction costs. Neither has it shown any firm commitments for the financing of the project or for the sale of the energy to be generated. Furthermore, it has not shown what facilities, if any, will be used to transmit such energy to prospective consumers. Although the application states a proposal that transmission lines should be constructed by a transmission cooperative, as a separate project, no evidence of the existence of either transmission cooperative or project for transmission lines has been offered."

"The issuance of a license is not justified by the record as it now stands." (P. 86)

The trier of the facts, as noted from the quotations above, found that there was no evidence in the record upon these matters, that they are necessary factors, and that therefore, the failure of proof leads to no other conclusion than that the proposition is economically infeasible. Notwithstanding this state of the record, the Commission arbitrarily and surreptitiously made the findings referred to that the project is economically feasible based upon the flimsy statements in the letters from McDougal & Condon and from the Acting Administrator of the Rural Electrification Administration.

Counsel for both Respondent and the Intervenor cite cases on abstract legal propositions with which we have no quarrel. We do challenge their applicability to the situations in the case at bar. We well realize that Section 313(b) provides that the findings of the Commission as to the facts, *if supported by substantial evidence,* shall be conclusive. Our complaint is that these salient propositions are not supported by any evidence, but are arbitrary findings and statements made by the Commission without foundation in the record. If upon review, this Court finds that the Petitioners are correct and that primary and principal

elements entering into economic feasibility are not sustained by any evidence, then the Petitioners should prevail as to these matters. This Court has no alternative than to grant our Petition for a Writ of Certiorari, and then upon review, it is for this Court to determine whether or not Petitioners are correct in their position.

The cases sustaining our position are many. We will cite only a few.

See *Consolidated Edison vs. National Labor Relations Board*, 305 U. S. 197, 229; 83 L. ed. 126, 140. There the Court said:

> "We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by substantial evidence * * *. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
>
> "But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." (305 U. S. 230; 83 L. ed. 140.)

See *Webre Stibe Co. vs. Commissioner of Internal Revenue*, 324 U. S. 164 at 173; 89 L. ed. 819 at 828, where this Court said:

> "We must determine whether there is evidence which is legally sufficient for administrative action but we may not weigh it."

See also *Shields vs. Utah Cent. R. Co.*, 305 U. S. 177 at p. 185; 83 L. ed. 111 at p. 117. *United States vs. Carolina Freight Carriers Corp.*, 315 U. S. 475, 489; 86 L. ed. 971, 982.

THE ACT OF AUGUST 14, 1946—CONSERVATION OF WILD LIFE.

Counsel for both the Commission and the Intervenor overlook the purport and the meaning of the Act of August 14, 1946, (60 Stat. 1080, 16 U. S. C. A. 661) relating to the protection and conservation of wild life. That law became effective on August 14, 1946 and requires that before a Federal permit can be granted to divert any river, the Federal Power Commission must first consult with the Fish and Wild Life Service and "the head of the Agency exercising administration over the wild life resources of the State" where the diversion occurs, with a view to preventing loss or damage to wild life resources, and the reports and recommendations of the Secretary of the Interior and of the Head of the Agency exercising administration over the wild life resources of the State based on surveys and investigations conducted by them, for the purpose of determining possible damage to wild life resources and of the means and measures that should be adopted to prevent loss and damage to wild life resources "shall be made an integral part of any report submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects." It is further provided in the law that "the cost of plans for the construction or installation and maintenance of any such means and measures shall be included in and shall constitute an integral part of the cost of such projects." These provisions have not been complied with by the Federal Power Commission, and the Conservation Commission of Iowa which is charged by the Iowa law with the conservation of wild life, fish and game has never been contacted by the Federal Power Commission, or requested to make such a survey and recommendations in connection therewith. The Commission attempts to get around this by providing in its order that the licensee shall make such

provision as may be required by the Secretary of the Interior in this regard. But the order ignores the State agency completely. We submit this is not sufficient and that the Federal Power Commission cannot blandly ignore the Act of Congress.

The Respondent in its brief, page 18, refers to the fact that the Iowa Conservation Commission was permitted to intervene in these proceedings and that a Mr. Schwob and a Dr. Bailey testified with regard to fish life in the area and the effect of the project thereon. Then counsel for the Commission states that they were given an opportunity to make any recommendations they desired in connection with the issuance of the license. What counsel for the Commission does not tell this Court is that these two men testified in 1942, four years before there ever was such a law. It seems peculiar that counsel would try to take advantage of that incongruous situation. Furthermore, counsel in argument, state that the Chief Biologist for the Conservation Commission testified at the 1946 hearing, but was not prepared to make any recommendations. The Power Commission had not requested the Iowa Conservation Commission to prepare or submit plans. The Power Commission is now trying to hide behind this flimsy reasoning to avoid compliance with the mandatory provisions of the Act of Congress referred to. This Court needs to investigate this matter too.

FAILURE TO COMPLY WITH SECTION 9(b).

The Petitioners cite error on the part of the Federal Power Commission in refusing to give proper consideration to, and to observe the provisions of Section 9(b) of the Federal Power Act, as interpreted and construed by this Court in *First Iowa Hydro-Electric Cooperative vs. Federal Power Commission, et al.*, 328 U. S. 152; 90 L. ed. 1143. In that case this Court gave a different interpretation and

meaning to Section 9(b) than did the Commission in its order of January 29, 1944. Both the Respondent and the Intervenor pass over this matter lightly by stating that this Court ruled that the Commission did not have to give any consideration to the Iowa laws because they were superseded by the Federal Power Act. That is not what this Court said. This Court remanded the case to the Federal Power Commission for further proceedings under the construction and interpretation given Section 9(b) by this Court in that opinion. That did not mean that Section 9(b) could be ignored entirely. If so, this Court would have said so. Your Petitioners pointed out in Division 4 of the Petition herein, beginning on page 25, that there were Iowa laws such as are referred to by this Court in its opinion and which the Commission refused to take any note of and refused to hear evidence on. Section 9(b) is a statutory guide rule and must be observed by the Commission. This Court said in *United States vs. Carolina Freight Carriers Corporation*, 315 U. S. 475 at 489; 86 L. ed. 971 at 982, the following:

> "Congress has made a grant of right to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from these standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided by judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed these statutory standards."

So this Court has no other alternative than to investigate the failure of the Commission to observe the requirements of Section 9(b) of the Act.

CONCLUSION.

The State of Iowa and those associated with it again submit that there are grave constitutional questions raised and involved herein which this Court needs to pass upon. That there have been flagrant violations of the Constitution and invasions of rights by the arbitrary and unconstitutional action of the Federal Power Commission herein, and that this Court cannot lightly pass over these charges by denying the Petition for a Writ of Certiorari. The fact matters which have been raised require review by this Court for the reason that we charge and earnestly believe that we can show this Court that there was a lack of evidence rather than a conflict of evidence upon many important factors entering into and affecting the findings and orders of the Commission complained of herein.

We respectfully request and pray that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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